JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

Lim Ker Phang v Tia & Noordin (sued as a firm)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–586 OF 2008
SUPANG LIAN J
19 FEBRUARY 2014

Civil Procedure — Pleadings — Failure to plead illegality — Whether court should consider unpleaded point

Tort — Negligence — Professional negligence — Duty of care arising from solicitor and client relationship — Whether defendant was appointed to act as common solicitors for both plaintiff/vendor and purchasers — Breach of duty — Whether defendant failed to take reasonable steps to ensure that balance of purchase price was paid before transferring property to purchasers — Whether plaintiff suffered damages as a result of defendant's breach — Whether 'but-for' test applied

The plaintiff, the owner of a piece of land with a double storey shop house situated in Kulai ('the property'), had entered into a sale and purchase agreement ('the SPA') to sell the property to one Ling Jiun Hong and Tan Kian Chong ('the purchasers') at the price of RM315,000. The SPA was prepared by one Tia Poh Loong ('DW1'), a solicitor in the legal firm of Tia & Noordin ('the defendant firm'), who had attended to the plaintiff/vendor and the purchasers when they had visited the defendant firm. At that point in time the property was charged to CIMB Bank Bhd, thus the plaintiff instructed DW1 to have the property transferred to his name and to redeem the property. The defendant did the necessary with regard to the redemption of the property. Subsequently the purchasers paid the plaintiff RM31,500, being 10% of the purchase price in respect of the property pursuant to the SPA and the plaintiff acknowledged receipt of the same. Acute disagreement arose between the plaintiff, the purchasers and the defendant as to what transpired thereafter. The plaintiff claimed that the property had been transferred to the purchasers even though he had not received the balance of the purchase price of RM154,372.36. The plaintiff thus commenced the present suit for the loss and damage he had suffered through the negligence of the defendant firm. It was the plaintiff's case that as the defendant had been appointed to act as common solicitors for both him and the purchasers, it had owed him a duty of care. The plaintiff further submitted that the defendant had acted in breach of that duty of care when it failed to take reasonable steps to ensure that the balance of the purchase price was paid by the purchasers before proceeding with the completion of the sale and purchase of the property. In its defence the defendant firm claimed that it that it had only represented the purchasers in respect of the SPA and that it had

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

A been only appointed by the plaintiff to redeem the property and to prepare the discharge of the charge. The defendant also submitted that the plaintiff had informed DW1 that the balance purchase price had been settled, whereupon the defendant had proceeded to transfer the title in the property to the purchasers.

B

Held, allowing the plaintiff's claim with costs:

(1) It is a well settled principle that even in the absence of a written retainer, the relationship of solicitor and client between the parties could be C implied by the conduct of the parties. In the present case, the conduct of the parties namely, the fact that the purchasers and the plaintiff/vendor had visited DW1 together and that the latter had taken instructions from the plaintiff, and the fact that DW1 had attested the plaintiff's signature without indicating that he was attesting only as a witness, led to the D irresistible inference that the defendant firm was acting as common solicitors for the plaintiff and the purchasers. Further the defendant's act of redeeming the property and preparing the deed of receipt and reassignment reinforced the plaintiff's case that the defendant was acting as a common solicitor for the plaintiff and the purchasers (see paras E 15–16 & 18–19).

(2) The defendant's bill of costs that charged the plaintiff RM300 for services rendered, when the fee for sale of a property worth RM315,000 came to about RM3,000 was of little probative value and nothing turned on the F fact that the plaintiff was billed only RM300. Based on the documentary evidence and the conduct of the parties, the plaintiff had proven on a balance of probabilities that the relationship of solicitor and client had in fact been established between the plaintiff and the defendant. That special relationship had given rise to a duty on the defendant to exercise G reasonable care and skill and to do that which the defendant had undertaken to do (see paras 20 & 22).

(3) The testimonies of DW1 and the purchasers that the defendant had only proceeded with the transfer of the property to the purchasers after receiving confirmation in the form of bank pay-in slips in a meeting at a H coffee shop in Kulai, which that the plaintiff had received payment of the balance of the purchase price, was rigorously challenged by the plaintiff. Upon careful scrutiny of the evidence it was clear that the evidence of the purchasers and DW1 was lacking in credibility. It was a term of the SPA that payment of the balance of the purchase price should take place in the I defendant's office but it did not. Further, as regards the bank-in slips, the amounts did not tally. As such, it was clear that the plaintiff had proved on a balance of probabilities that the alleged meeting at the coffee shop did not take place but was an afterthought. Thus, by transferring the property to the purchasers before the plaintiff had been paid the balance

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

of the purchase price, the defendant had breached its duty of care as solicitors acting for the plaintiff (see paras 29–32).

(4) Applying the 'but-for' test it was crystal clear that the effective cause of the plaintiff's loss of the property and the balance purchase price was the act of the defendant in not ensuring that the purchasers had paid the full balance purchase price to the plaintiff before transferring the property in favour of the purchasers. In the circumstances the plaintiff had proved on a balance of probabilities his claim in negligence against the defendant and the damage caused to the plaintiff was the loss of the balance of the purchase price (see paras 38 & 40).

(5) The defendant's submission that the transaction was tainted with illegality was an unpleaded point. Hence the point was vexatious and without merit (see para 39).

[Bahasa Malaysia summary

Plaintif, pemilik sebidang tanah dengan kedai dua tingkat yang terletak di Kulai ('hartanah tersebut'), telah memasuki perjanjian jual beli ('PJB') untuk menjual hartanah tersebut kepada Ling Jiun Hong dan Tan Kian Chong ('pembeli-pembeli') pada harga RM315,000. PJB tersebut telah disediakan oleh Tia Poh Loong ('DW1'), peguamcara di firma undang-undang Tetuan Tia & Noordin ('firma defendan'), yang telah berurusan dengan plaintif/penjual dan pembeli-pembeli tersebut apabila mereka datang ke firma defendan. Pada masa itu hartanah tersebut telah dicagarkan kepada CIMB Bank Bhd, oleh itu plaintif telah mengarahkan DW1 untuk memindahkan hartanah tersebut kepada namanya dan untuk menebus hartanah tersebut. Defendan telah melakukan apa yang patut berhubung penebusan hartanah tersebut. Berikutan itu pembeli-pembeli tersebut telah membayar kepada plaintif RM31,500, iaitu 10% daripada harga belian berkaitan hartanah tersebut menurut PJB tersebut dan plaintif mengakui penerimaan yang sama. Perselisihan telah timbul antara plaintif, pembeli-pembeli dan defendan berhubung apa yang berlaku selepas itu. Plaintif mendakwa bahawa hartnah tersebut telah dipindahkan kepada pembeli-pembeli tersebut meskipun dia tidak menerima baki harga belian berjumlah RM154,372.36. Plaintif dengan itu telah memulakan guaman ini untuk kehilangan dan kerugian yang dialaminya disebabkan kecuaian firma defendan. Adalah kes plaintif oleh kerana defendan telah dilantik untuk bertindak sebagai peguamcara bersama untuk kedua-dua dia dan pembeli-pembeli tersebut, maka ia mempunyai kewajipan berhati-hati terhadapnya. Plaintif selanjutnya berhujah bahawa defendan telah bertindak melanggar kewajipan berhati-hati itu apabila ia gagal mengambil langkah-langkah munasabah bagi memastikan bahawa baki harga belian telah dibayar oleh pembeli-pembeli tersebut sebelum meneruskan untuk menyelesaikan jual beli hartanah tersebut. Dalam pembelaannya firma defendan mendakwa bahawa ia hanya mewakili pembeli-pembeli tersebut berkaitan PJB tersebut dan bahawa ia hanya dilantik oleh plaintif untuk

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

menebus hartanah tersebut dan untuk menyediakan pelepasan cagaran itu. Defendan juga berhujah bahawa plaintif telah memberitahu DW1 bahawa baki harga belian telah pun selesai, yang mana defendan telah meneruskan dengan pemindahan hak milik hartanah tersebut kepada pembeli-pembeli.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Adalah prinsip tetap bahawa meskipun dengan ketiadaan retainer bertulis, hubungan peguamcara dan anak guam antara pihak-pihak boleh dimaksudkan secara tersirat melalui tingkah laku pihak-pihak. Dalam kes ini, tingkah laku pihak-pihak iaitu, fakta bahawa pembeli-pembeli tersebut dan plaintif/penjual telah datang bersama berjumpa DW1 dan bahawa DW1 telah mengambil arahan daripada plaintif, dan fakta bahawa DW1 telah memperakui tandatangan plaintif tanpa menunjukkan bahawa dia memperakui hanya sebagai saksi, membawa kepada inferens yang tidak boleh disangkal bahawa firma defendan tersebut bertindak sebagai peguamcara bersama untuk plaintif dan pembeli-pembeli tersebut. Selanjutnya tindakan defendan menebus hartanah tersebut dan menyediakan surat ikatan penerimaan dan penyerahhakan semula memperkukuhkan kes plaintif bahawa defendan bertindak sebagai peguamcara bersama untuk plaintif dan pembeli-pembeli tersebut (lihat perenggan 15–16 & 18–19).

(2) Bil kos defendan yang mengenakan caj RM300 kepada plaintif untuk perkhidmatan yang diberikan, walhal yuran untuk jualan hartanah tersebut bernilai RM315,000 adalah lebih kurang RM3,000 adalah nilai yang sedikit dan tiada apa-apa atas fakta yang plaintif hanya dibilkan RM300. Berdasarkan keterangan dokumentar dan tingkah laku pihak-pihak, plaintif telah membuktikan atas imbangan kebarangkalian bahawa hubungan peguamcara dan anak guam telah pun wujud antara plaintif dan defendan. Hubungan istimewa itu telah menimbulkan kewajipan ke atas defendan untuk melaksanakan sikap berhati-hati dan kemahiran yang munasabah dan untuk melakukan apa yang defendan mengaku janji untuk lakukan (lihat perenggan 20 & 22).

(3) Testimoni-testimoni DW1 dan pembeli-pembeli bahawa defendan hanya meneruskan dengan pemindahan hartanah kepada pembeli-pembeli selepas menerima pengesahan di dalam bentuk slip bayaran masuk bank di dalam mesyuarat di kedai kopi di Kulai, yang mana plaintif telah menerima bayaran untuk baki harga belian, telah dicabar oleh plaintif. Setelah diteliti keterangan itu adalah jelas bahawa keterangan pembeli-pembeli tersebut dan DW1 tidak boleh dipercayai. Adalah terma PJB tersebut bahawa bayaran untuk baki harga belian patut dilakukan di pejabat defendan tetapi tidak begitu. Selanjutnya, berhubung slip-slip masuk bank itu, jumlah-jumlahnya tidak sama. Oleh itu, adalah jelas plaintif telah membuktikan atas imbangan

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

kebarangkalian bahawa mesyuarat yang dikatakan di kedai kopi tersebut tidak berlaku tetapi hanya suatu yang telah difikirkan kemudian. Oleh itu, dengan memindahkan hartanah tersebut kepada pembeli-pembeli sebelum plaintif telah membuat bayaran untuk baki harga belian, defendan telah melanggar kewajipan berhati-hati sebagai peguamcara yang bertindak untuk plaintif (lihat perenggan 29–32).

(4) Dengan menggunakan ujian 'but-for' adalah jelas bahawa punca nyata kehilangan hartanah plaintif dan baki harga belian adalah tindakan defendan yang tidak memastikan bahawa pembeli-pembeli itu telah membayar penuh baki harga belian kepada plaintif sebelum memindahkan hartanah tersebut yang memihak kepada pembeli-pembeli itu. Dalam keadaan ini plaintif telah membuktikan atas imbangan kebarangkalian tuntutan kecuaiannya terhadap defendan dan kerugian yang disebabkan kepada plaintif adalah kehilangan baki harga belian itu (lihat perenggan 38 & 40).

(5) Penghujahan defendan bahawa transaksi itu dicemari kerana menyalahi undang-undang tidak dipli. Justeru perkara itu adalah menyusahkan dan tanpa merit (lihat perenggan 39).]

Notes

For cases on professional negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1459–1549.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Caparo Industries Plc v Dickman and others [1989] 1 All ER 798, CA (refd)

Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor [1989] 3 MLJ 434, HC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 AMR 3744, SC (consd)

Lai Foh & Sons Sdn Bhd v Skrine & Co (didakwa sebagai sebuah firma) [2001] MLJU 250; [2001] 3 CLJ 185, SC (refd)

Lanphier and Wife v Phipos (1838) 8 Car & p 475; (1838) 173 ER 581 (refd)

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, Ch D (refd)

Nocton v Lord Ashburton [1914] AC 932, HL (refd)

Superintendent of Lands and Surveys, (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)

Swamy v Mathews &Anor [1968] 1 MLJ 138; [1967] 1 LNS 174, FC (refd)

Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1; [2011] 1 CLJ 409, FC (refd)

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

A *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, FC (refd)

Legislation referred to

Solicitors' Remuneration Order 2005

B

Raw Kim Hwa (Zamzuri bin Mohamed with him) (CF Wong & Co) for the plaintiff.
George Neo (Yeo, Tan, Hoon & Tee) for the defendant.

C **Supang Lian J:**

INTRODUCTION

[1] The plaintiff claimed for damages against the defendant based on the alleged negligence of the defendant in the performance of their duties as solicitors in respect of a sale and purchase transaction of a shop house. The defendant disputed the claim. The trial of the action took three days. Four witnesses testified for the plaintiff, namely, Lim Ker Phang ('PW1' — the plaintiff); Chin Fui Shen ('PW2'); Woon See Chin ('PW3'); Wong Cheer Fong ('PW4'), whereas the defendant called three witnesses, namely, Tia Poh Loong ('DW1'), Tan Kian Chong ('DW2') and Ling Juin Hong ('DW3'). I found for the plaintiff and entered judgment against the defendant in the sum of RM154,372.36 with interest and costs of the action.

F THE BUNDLE OF DOCUMENTS AND EXHIBITS

[2] The documents produced and admitted as evidence at the trial are as follows:

G (a) bundle A — agreed bundle of documents (Part A);

(b) bundle B — agreed bundle of documents (Part B);

(c) bundle C — disputed bundle of documents (Part C);

H (d) bundle D — the plaintiff's additional bundle;

(e) bundle K — the plaintiff's additional bundle (2);

(f) exh P1 — pp 1–2 of bundle C;

I (g) exh P2 (A)–(O) — pp 3–17 of bundle C;

(h) exh P3 — p 18 of bundle C;

(i) exh P4 (A)–(L) — pp 19–30 of bundle C;

(j) exh P5 — p 31 of bundle C;

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

(k) exh P6 (A)–(F) — pp 32–37 of bundle C; and

(l) exh D2 — letter dated 16 October 2007.

Hereinafter, I will refer to the documents by their bundle markings and page numbers. For instance p1 of bundle A will be referred to as A:1; p 3 of bundle B as B:3 and so on.

FACTUAL BACKGROUND

[3] The plaintiff's and the defendant's versions of the events are is often times at complete variance, hence, I had to carefully evaluate and shift the evidence to come to findings of facts. The narrative that follows is what I could make out of the undisputed facts from the testimonies of the witnesses, the documentary exhibits, the pleadings, the statement of agreed facts (bundle E) and respective case summaries (bundles G and H) of the parties.

[4] The plaintiff was the owner of a property held under HS (D) 341163 PTD 67814 Mukim Senai — Kulai, District of Johor Bahru together with a double storey shop house known as No 61, Jalan Anggerik 3, Taman Kulai Utama, Kulai, Johor ('the property'). The defendant is and was at all material times a firm of solicitors practising at No 25A, Jalan Dedap 19, Taman Johor Jaya, Johor Bahru. Sometime in September 2006 the plaintiff (PW1) and Tan Kian Chong (DW2) and Ling Juin Hong (DW3) went to the defendant's office in Johor Jaya because the plaintiff wanted to sell the property to DW2 and DW3 ('the purchasers') who in turn wanted to buy it. The plaintiff and the purchasers were attended to by Tia Poh Loong (DW1), a lawyer practising in the defendant's firm. According to the plaintiff, he and the purchasers had engaged the defendant firm as their common solicitors to act in the transaction whereas DW1, DW2 and DW3 testified that only DW2 and DW3 had engaged DW1 to represent them in the purchase. At that point in time, the property was still registered in the name of the developer and charged to CIMB Bank Bhd ('CIMB Bank' or 'the bank'). DW1 said he would have to conduct a search of the title deed of the g property at the land office.

[5] DW1 made a search of the property on 13 September 2006 (see B:1–2) and it revealed that the developer was indeed the registered owner. DW1 informed the plaintiff and the purchasers. The plaintiff asked DW1 to have the property transferred to his name and to redeem the property. DW1 acted accordingly and the property was transferred from the developer to the plaintiff in the middle of February 2007 (refer (a) DW1's witness statement: Q & A 11 and Q & A 12 (b) paras 7–8 of submission of the defendant after trial dated 2 June 2011 (c) documents at pp 4–7 of bundle B). On 7 March 2007, the defendant by the letter B:7 appointed the defendant as his solicitors to redeem

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

the property and to prepare the discharge of charge as well as to collect the title deed from CIMB Bank. The defendant wrote on the same day to CIMB Bank to redeem the property.

[6] DW1 in the meantime had prepared the sale and purchase agreement (A:1–9 or 'the SPA'). The plaintiff, DW2 and DW3 executed the agreement in the presence of DW1 at the office of the defendant. The SPA is dated 8 March 2007. The salient terms are:

(a) s 6 of Schedule — the purchase price of the property is RM315,000;

(b) s 7 of Schedule — the sum of RM31,500 representing 10% of the purchase price was paid by the purchasers to the plaintiff upon execution of the agreement;

(c) ss 9–10 of Schedule — the balance of the purchase price is RM283,500 and it is to be paid by the purchasers within three months from the date of the agreement ('the completion date');

(d) cl 4 — upon execution of the agreement, the plaintiff shall execute a valid and registrable memorandum of transfer ('MOT') in favour of the purchasers and the same shall be deposited with the purchasers' solicitors for adjudication by the collector of stamp duties and the purchasers shall not present the same for registration unless the purchase price has been made in full;

(e) cl 5 — in the event the purchasers shall fail to settle the balance of the purchase price of RM283,500 on the completion date, the purchasers shall be granted an extension of one month from the date of expiration of the completion date ('the extended completion date') provided that interest at the rate of 6%pa be paid on a day to day basis on the balance of the purchase price;

(f) cl 6(a) — on or before the extended completion date, the purchasers shall make payment of the balance purchase price to the vendor's solicitors;

(g) cl 15 — in the event the purchasers neglect to pay the balance of the purchase price on the completion date, a sum equivalent to 10% of the purchase price shall be forfeited forthwith whereupon the agreement shall be treated as null and void and of no further effect; and

(h) cl 2 — the balance purchase price and the purchase price of the property shall be paid at the office of Tia & Noordin Advocates & Solicitors (the defendant) at Taman Johor Jaya and the purchase of the property shall be completed at the same office of the defendant.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

[7] It is common ground that the defendant were the only solicitors handling the sale and purchase of the property (see para 4 of bundle E). By a letter of acknowledgment dated 8 March 2007 (B:8) prepared by the defendant, the plaintiff acknowledged receipt of RM31,500 being 10% of the purchase price in respect of the property pursuant to the agreement. By a letter dated 4 April 2007 (B:13–14) DW1 forwarded cheques from the purchasers for the total sum of RM129,127.64 to CIMB Bank towards payment of the redemption sum. After the bank had confirmed payment, the plaintiff and his wife (DW2) met DW1 at McDonald's in Kulai where they executed the deed of receipt and reassignment (B:24–28). In his testimony, DW1 gave the date of meeting at McDonald's, Kulai and the date of execution of B:24–28 as 30 April 2007. However, DW1 had also testified that the defendant issued a bill to the plaintiff for the sum of RM600 for the work done in respect of signing the receipt and reassignment to redeem the property. The bill is produced at p 14 bundle A (A:14) but it is dated 24 April 2007, six days before execution of the receipt and reassignment. The defendant also issued a receipt (A:15) for the payment of RM600 made by the plaintiff. The receipt A:15 is dated 24 April 2007 and it states that the payment of RM600 made by the plaintiff is for 'part cost and disbursements' for the property.

[8] Now, as to what happened after 30 April 2007 was a matter of acute disagreement between the parties. I will revert to this later. Suffice it to say at this stage that according to the plaintiff he went after the purchasers and DW1 for the balance of the purchase price but in vain. Eventually the plaintiff went to the legal firm of Messrs Foo & Woon to seek advice from PW3, an advocate and solicitor. PW3 testified that he assisted the plaintiff to conduct a search of the property on 10 May 2007. The search revealed that that the property had been transferred to the purchasers on 3 May 2007. He assisted the plaintiff to lodge a caveat. The plaintiff testified that the transfer of the property was done despite the fact that he had yet to receive the balance purchase price of RM154,372.36 (after deducting redemption sum of RM129,127.64). He said that the purchasers in fact never paid him the balance purchase price, hence, this civil suit.

THE PLAINTIFF'S PLEADED CASE

[9] The plaintiff and the purchasers engaged the defendant as common solicitors to act for them in the sale and purchase transaction of the property. Pursuant to the SPA, the purchasers were contractually liable to pay the balance purchase price of RM154,372.36 within three months from the date of the SPA. In breach of the duty of care, the defendant had failed to take reasonable steps to ensure that the balance purchase price was paid and failed to advice the plaintiff that the purchasers had failed to settle the balance purchase price or on before the completion date. The defendant failed to protect the plaintiff's interest by proceeding with the completion of the sale and purchase of the

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

property and registration in favour of the purchasers even when the purchase price had not been fully paid. By reason thereof the plaintiff had suffered loss and damage as follows: (a) balance purchase price of RM154,372.36 (b) the plaintiff's costs of obtaining legal advice from another firm of solicitors and (c) loss of use of the property.

THE DEFENCE

[10] The defences are:

(a) the defendant represented the plaintiff for the purpose of transferring the property and to discharge the charge only;

(b) in the sale and purchase agreement, the defendant only represented the purchasers; and

(c) the plaintiff informed the defendant that the plaintiff and the purchasers were old friends and all payment transaction would be conducted among themselves. The plaintiff informed the defendant that the balance purchase price had been settled and thereafter, the defendant presented the transfer of the property to the land office.

ISSUES FOR DETERMINATION

[11] From the foregoing and matters raised in the submissions, the issues to be determined were as follows:

(a) whether the defendant owed a duty of care to the plaintiff;

(b) whether the defendant had breached that duty of care;

(c) whether the plaintiff had suffered damages as a result of the breach of duty of care; and

(d) whether the transaction was tainted with illegality.

DID THE DEFENDANT OWE A DUTY OF CARE TO THE PLAINTIFF

[12] The question arising was whether the defendant owed a duty of care to the plaintiff when DW1 completed the sale and purchase of the property and registered the transfer of the property to DW2 and DW3 at the land office. The plaintiff contended that the defendant owed such a duty of care towards the plaintiff based on two grounds:

(a) the existence of a solicitor and client relationship between the defendant and the plaintiff; or

(b) in the alternative, based on the tortious liability of conveyancing solicitors to a third party on the principles laid down in *Caparo Industries*

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

Plc v Dickman and others [1989] 1 All ER 798.

DUTY OF CARE ARISING OUT OF SOLICITOR AND CLIENT RELATIONSHIP

[13] Under the general law, the relationship of solicitor and client gives rise to a duty of care and skill on the solicitor in carrying out that which he has undertaken to do. This duty of care is spoken of in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571:

> The solicitors were however liable to the plaintiff's in tort because under the general law the relationship of solicitor and client give rise to a duty of a solicitor to exercise that care and skill on which he knew that his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do. Furthermore, there was no rule of law which confined a solicitor's duty to his client under his retainer to a contractual duty alone; nor was there any rule of law which precluded a claim in tort for breach of a duty to use reasonable care and skill if there was a parallel contractual duty of care.

(followed in *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor*; *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434; *Lai Foh & Sons Sdn Bhd v Skrine & Co (didakwa sebagai sebuah firma)* [2001] MLJU 250; [2001] 3 CLJ 185).

[14] The plaintiff contended that a solicitor and client relationship existed between the defendant and the plaintiff because the defendant had acted as common solicitors for both the vendor (the plaintiff) and the purchasers (DW2 and DW3) in the sale and purchase of the property. The defendant on the other hand denied that they were the common solicitors on grounds as follows:

(a) they only acted for the plaintiff in the discharge of charge and not in the sale of the property to the purchasers. This is proven from the following facts:

  (i) the plaintiff only paid RM600 to the defendant for attending to the deed of receipt and reassignment (comprising RM300 for the legal fees and the balance for disbursements);

  (ii) the fee for sale of property worth RM315,000 is about ten times more than RM300 (see Solicitors' Remuneration Order 2005);

  (iii) the defendant's bill clearly states it is for 'receipt and reassignment'. The bill is a Part A document agreed on authenticity and truth of content; and

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

(iv) the plaintiff admitted at the trial that the RM300 was for the preparation of receipt and reassignment,

(b) the SPA provides that solicitors' cost shall be borne by the purchasers. There was no reason for the defendant to become a common solicitor and not being paid for the services by the vendor;

(c) the letter of 7 March 2007 clearly states that appointment of the defendant was for discharge of charge only;

(d) DW1 gave evidence (supported by DW2 and DW3) that he did not act for the plaintiff in the sale and purchase of the property. DW1 had asked the plaintiff to appoint his own solicitors but the plaintiff chose not to; and

(e) there is no conflict of interest as it is usual for solicitors to act for the purchaser in a sale and purchase and also act for the vendor to discharge a property. Both parties would want the transaction completed by having the property discharged and then transferred to the purchaser. Further, the plaintiff knew that the defendant was acting for the purchasers when he appointed the defendant to discharge the charge with CIMB Bank.

[15] I did not agree with the defendant on this issue and found instead that the defendant were acting as common solicitors for the parties in the sale and purchase transaction. It is well-settled principle that even in the absence of a written retainer, the relationship of solicitor and client between the parties can be implied by the conduct of the parties. The Federal Court so held in *Yong & Co v Wee Hood Teck Development Corporation* at p 43:

> In our view, there was ample evidence on record for the learned judge to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client (*Midland Bank Trust Co Ltd v Hett, Stubbs & Kempt (a firm)* [1978] 3 All ER 571).

Mohamed Yusoff J referred to *Yong & Co* in *Dato' Seri Au Ba Chi* and said at p 436:

> The question that arose was whether the second defendant was also acting for the first and second plaintiff's as common solicitor when disbursement of the loan was made on their behalf. There was no written retainer of the second defendant by the plaintiff's. But there is no legal requirement for retainers to be in writing — *Corderey on Solicitors* (7th Ed) at p 50. In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kempt (a firm)* [1978] 3 All ER 571 at p 578:
>
> > ... a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

There is sufficient evidence to show that the conduct of the parties intended that the relationship of solicitor and client was to continue to exist between the second defendant and the plaintiff's from their earlier dealings. These were: In November 1980, the second defendant charged the same properties belonging to the first plaintiff's to Malayan Banking Bhd. ... In September 1981, the second defendant prepared agreements for the second plaintiff. ... Between 1980–1983, the relationship between the first plaintiff and the second defendant was good and they were friends and they had other dealings together. The second defendant said the first plaintiff had always paid his fees promptly.

[16] The conduct of the parties in the present case which, in my judgment, irresistibly led to the inference that the defendant were acting as common solicitors for the plaintiff and the purchasers are these. First, from the combined evidence of the plaintiff, DW2 and DW3 it was apparent that once it was agreed betwixt them that the plaintiff sold and DW2 and DW3 bought the property, they all went together to see DW1 and informed him of their intentions. DW1 himself testified that the plaintiff and the purchasers came together to see him. In describing the events of this first meeting, DW1 gave the impression that he was taking most of the instructions from the plaintiff, rather than the purchasers. DW1 testified that he obtained the particulars of the property from the plaintiff and conducted a search. After ascertaining from the search that the land was indeed registered in the name of the developer, DW1 said that he called the plaintiff and DW3. This is significant because if he was not engaged as the common solicitor for both sides, there was no necessity to call the plaintiff.

[17] Second, as we have seen from DW1's own evidence, arising from that phone call the plaintiff had gone back to see him at the office and asked him to transfer the property from the developer to. himself and to redeem the property. DW1 confirmed that he did act on the instruction and represented the plaintiff in transferring the property from the developer to the plaintiff. The defendant admitted that the transfer was accordingly effected in the middle of February 2007. To my mind, the conduct of DW1 in so acting for the plaintiff in transferring the property from the developer to the plaintiff was a continuum of his retainer as common solicitor for all the parties whereby the relationship of solicitor and client could be implied.

[18] Third, we move on to consider the provisions of the agreement (the SPA) that the parties had executed which is dated 8 March 2007 (A:1–9). A close scrutiny would reveal that there was nothing contained therein which states that the defendant was acting only for the purchasers. DW1 admitted as much under cross-examination. Further, the SPA shows that the defendant had attested the signature of the plaintiff without indicating that he was only attesting as a witness. This is significant because, as noted earlier, it is common ground between the parties that the SPA was prepared by the defendant and the

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

defendant were the only solicitors handling the SPA. To my mind, it did not stand to reason that DW1 did not endorse the words 'Attestation as a witness only' below the signature of the plaintiff if he had indeed intended to attest only as a witness. Likewise, if DW1 was acting only for the purchasers, it did not stand to reason that he did not incorporate a clause in the SPA to state exactly that. When cross-examined on this, DW1 came up with the confounding answer, 'Like I say it's a variation of what the parties want at that time and even the money everything does not pass through me from the very outset and also we do not actually meet in the office all the time'. With respect, this was saying nothing at all. In my judgment, the SPA document speaks for itself and it lent credence to the evidence of the plaintiff that the defendant right from the start was engaged as the common solicitors for the plaintiff and the purchasers. As for the evidence of DW1, DW2 and DW3 that DW1 was retained by only the purchasers and not the plaintiff and that the plaintiff was advised to look for another solicitor but declined, they were interested witnesses. They had every reason to give contradictory evidence. In view that the SPA was drafted and prepared by DW1 yet there was a total lack of express terms in the SPA to support their assertions, I had no difficulty in treating their evidence as suspect and doubtful. I rejected their evidence.

[19] I turn now to the defendant's act in redeeming the property from CIMB Bank and preparing the deed of receipt and reassignment. With respect, I agreed with the plaintiff that if anything, the defendant's acting for the plaintiff in the preparation of the deed and reassignment further reinforced the case for the plaintiff that the defendant was acting as a common solicitor as the redemption of the property from CIMB Bank comprised part and parcel of the sale and purchase transaction. To my mind, like the work done for the plaintiff in getting the property transferred from the developer to the plaintiff, this work done to redeem the property could also pass as an incidence or a continuum of the retainer of the defendant as common solicitors for both the vendor and the purchasers.

[20] With regard the bill of cost (A:14), the defendant contended that the plaintiff could not dispute the truth of the content as it is a part A document (relying on *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 AMR 3744). I could not have agreed more. However, the bill itself (A:14) states in no uncertain terms that the RM300 charged is for 'professional charges for services rendered: Negotiating, drafting, preparing and engrossing Agreement, search, explaining attending to execution Witnessing attestation, stamping, valuation, presenting for registration informing of development from time to time and other personal attendances and telephone conversations not specifically set out above'. Thus, the bill itself negates the defendant's contention that the RM300 was only for 'receipt and reassignment'. DW1

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

attempted to explain that the bill is a standard format. By the very same principle in voked by the defendant (as laid down in *Jaafar bin Shaari*), the defendant was precluded from disputing the truth of what the bill states. The defendant could not approbate and reprobate. In my judgment, the defendant's reliance on the bill (A:14) was misplaced as it did not assist them in proving what they thought they wanted to prove by it. In any event, the fact that the defendant had charged the plaintiff only RM300 for professional services rendered (when the fee for sale of property worth RM315,000 is about RM3000), came as no surprise at all given the evidence of PW4, an advocate and solicitor in practice for 30 years, that the norm in conveyancing practice is that where there is a common solicitor, the fees will be paid by the purchasers. This evidence of PW4 stood because the defendant had not adduced any evidence to the contrary. Thus, the bill was of little probative value and nothing turned on the fact that the plaintiff was billed only RM300.

[21] As for the receipt A:15, going by the principle enunciated in *Jaafar bin Shaari*, the parties were precluded from disputing the truth of the content. Although the receipt shows that the plaintiff had paid the defendant only RM600, it states that the payment is for 'Part Cost & Disbursements for property held under HS (D) 341163 PTD 67814 Mukim of Senai - Kulai'. With all due respect, the defendant could not get away with the fact that their own document suggest that there would be further payment being balance of costs and disbursement which were yet to be paid by the plaintiff in respect of professional services rendered by the defendant. Thus, instead of supporting the case for the defendant, this receipt only served to reinforce the case for the plaintiff that the defendant had acted as common solicitors.

[22] Based on the foregoing documentary evidence and the conduct of the parties, I was satisfied that the defendant was acting as common solicitors for both the plaintiff and the purchasers in the sale and purchase transaction and a retainer was to be presumed. The plaintiff therefore had proved on balance of probabilities that the relationship of solicitor and client had in fact been established between the plaintiff and the defendant. That special relationship gave rise to a duty on the defendant to exercise reasonable care and skill to do that which the defendant had undertaken to do and which, the plaintiff had relied on the defendant to do (see *Midland Bank Trust Co Ltd*).

DUTY OF CARE BASED ON TORTIOUS LIABILITY OF THE DEFENDANT (AS SOLICITORS) TO A THIRD PARTY ON THE DONOGHUE V STEVENSON AND CAPARO INDUSTRIES PLC PRINCIPLE

[23] In view of my finding that the plaintiff had established the duty of care based on the existence of the solicitor and client relationship between the

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

defendant and the plaintiff, I did not think it necessary to consider this alternative submission from the plaintiff. I would say in passing though that this alternative cause of action was never in the pleadings. Neither was it raised in the plaintiff's case summary (bundle G) nor the issues to be tried (bundle F). I noted that the plaintiff started to raise the issue at the trial in the course of cross-examining DW1. The pleaded cause of action of the plaintiff had always been in negligence arising from the relationship of solicitor and client premised on the defendant having been acting as common solicitors for the plaintiff and the purchasers. The alternative submission was therefore a marked departure from the pleadings and the plaintiff ought to be precluded from raising it (see *Superintendent of Lands and Surveys, (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185). In any case, as I said, there was no necessity to determine the issue.

DID THE DEFENDANT BREACH THE DUTY OF CARE

[24] The liability of a solicitor to his client in the tort of negligence has been considered in a line of cases. An authority of antiquity is *Nocton v Lord Ashburton* [1914] AC 932 at p 956 where Lord Haldane LC said: 'The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him.' In *Swamy v Mathews &Anor* [1968] 1 MLJ 138; [1967] 1 LNS 174, Barakbah LP applied *Lanphier and Wife v Phipos* (1838) 8 Car & p 475; (1838) 173 ER 581 where Tindal CJ said:

> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, ... nor does he undertake to use the highest degree of skill ... but he undertakes to bring a fair, reasonable and competent degree of skill (see also Lord Fullerton in *Cooks v Falconer's Representatives* [1850] 13D, p 157, at p 172)

Halsbury's Laws of England (4th Ed), para 135 puts it this way:

> A solicitor holds himself out to his clients as having adequate skill and knowledge properly to conduct all business that he undertakes, whether contentious or non-contentious. He owes a duty to his client both in contract and in tort, and he may be liable to a third person for the tort of negligence. Where the solicitor is in breach of his contractual duty to his client, or where he fails to use proper care and his client or third person, where he owes a duty of care to that third person, suffers loss as a result, he is liable in damages even if the claim in negligence is for purely financial loss.

The Federal Court decision of *Yong & Co v Wee Hood Teck Development* has been referred to above. In relation to a solicitor's liability in tort to his client, Syed Agil Barakbah FJ stated as follows:

> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skilful and careful and for failure to fulfil this

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort (see *Halsbury's Laws of England*, (3rd Ed), vol 36 p 96, para 131). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do (*Midland Bank Trust Co Ltd*).

[25] It will be recalled that by cl 2 of the SPA, the balance purchase price of the property shall be paid at the office of Tia & Noordin Advocates & Solicitors at Taman Johor Jaya and the purchase of the property shall be completed at the same office of the defendant. Clause 4 on the other hand enjoins the purchasers not to present the memorandum of transfer for registration unless the purchase price has been made in full.

[26] The plaintiff contended that the defendant was negligent by transferring the property to the purchasers without ascertaining whether the plaintiff had been paid the balance of the purchase price. In this regard, the plaintiff gave evidence that when he and PW2 met DW1 at McDonald's, Kulai, he had asked DW1 when he was to be paid the balance purchase price as it had been many months since the SPA was signed. DW1 had told him that it was in the process. The plaintiff and PW2 told the court that subsequently they met with the purchasers at a Malay coffee shop at Taman Ungku Tun Aminah in Johor Bahru. When the plaintiff asked them when the balance purchase price was going to be paid, they instead told him to look for DW1. The plaintiff then telephoned DW1 who in turn had asked him to look for the purchasers. A week later, the plaintiff met the purchasers at a Chinese coffee shop in Taman Ungku Tun Aminah. When pressed for the purchase price, the purchasers again asked the plaintiff to look for DW1. It was after this that the plaintiff went to see PW3.

[27] The plaintiff further testified that he and the purchasers were involved in 4-Digit business. He claimed to have told DW1 of this when he first met DW1 in September 2006 over the sale and purchase transaction of the property. He said that C:1–2 (P1) is a table that he had prepared of the cash payments credited into his bank account by the purchasers in 2006 and 2007 in respect of the 4-Digit business. C:3–17 (P2(A)–(O) are the bank statements evidencing payments in P1. He said that the table C:18 (P3) (supported by bank statements C: 19–30 (P4 (A)–(L)) on the other hand is of the payments that he had made to the purchasers and their companies in the year 2006 and 2007. C:31 (P5) is another table (supported by bank-in slips/receipts C:32–37 (P6 (A)–(F)) that the plaintiff had prepared of the cash payments made by him to the purchasers and their companies in 2007.

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

[28] DW1 on the other hand gave evidence that he had confirmed not only with the purchasers but also with the plaintiff that the balance purchase price had been paid. He said that after he received the redemption statement from the bank, he met with the plaintiff, DW2 and DW3 at a coffee shop near his office. When he explained the redemption statement to the plaintiff and the purchasers they told him they were old friends and they would conduct all payment transactions among themselves. The purchasers told him that most of the purchase price had been paid. He turned to the plaintiff and he confirmed it. He told them to go to his office to do the necessary paper work. They agreed but did not attend except for one of the purchasers who came with the original bank in slips which he left in DW1's office. In their evidence, DW1, DW2 and DW3 all stated that the plaintiff did not attend at DW1's office because 'he (the plaintiff) was busy as he stayed and worked in Kulai.' DW1 said that B:17 is the list of payments made by the purchasers to the plaintiff and B:18–23 are the bank-in slips. DW1 testified that since he got the bank-in slips and the plaintiff's confirmation that he was paid, he proceeded to present the transfer of the property to the purchasers. He claimed that afterwards when he met the plaintiff at McDonald's in Kulai, he had also told the plaintiff specifically of his intention to present the transfer for registration. DW2 and DW3 gave substantially the same evidence as that of DW1. It is to be noted that the plaintiff mounted a rigorous challenge of the evidence of DW1, DW2 and DW3.

[29] In the face of the diametrically different stories from the plaintiff on the one hand and DW1 and the purchasers on the other, I had as I said earlier to carefully evaluate the evidence and assess the credibility of the witnesses. In the end I found I could not believe the evidence of DW1, DW2 and DW3 with regard this meeting with the plaintiff in the coffee shop one late afternoon. Firstly, I took note that all three defence witnesses stated that the coffee shop was not far from the office of the defendant which is in Johor Jaya. DW1 in examination-in-chief stated that he asked all three (ie the plaintiff, DW2 and DW3) to go to the office to sign the necessary papers. When asked why the plaintiff did not go to the office as instructed, DW1, DW2 and DW3 all came up with the common answer that the plaintiff 'was busy as he stayed and worked in Kulai.' I found it rather odd that they should have answered in that manner considering that according to them the plaintiff was at that point of time purportedly at the coffee shop nearby the defendant's office and could not have been busy with work in Kulai. In my view, them saying that the plaintiff was busy as he stayed and worked in Kulai and therefore could not attend at the office of the defendant to sign the documents is a dead giveaway that the plaintiff was never at that coffee shop that afternoon as claimed by them. As they had let on, he must have been in Kulai where he stayed — busy with work.

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

[30] Secondly, as the solicitor that had drafted and prepared the SPA, DW1 was expected to be clear in his mind that in accordance with the provisions of cl 2 of the SPA, the balance of the purchase price of the property shall be paid at the office of the defendant at Taman Johor Jaya before the purchase of the property shall be completed. It was therefore an improbable story that the plaintiff had actually been paid the full balance purchase price to the knowledge of DW1, yet with absolutely nothing in black and white to show for it. To my mind, if indeed the plaintiff had admitted to DW1 that the balance purchase price had already been paid in full, DW1 in all probability would have ensured that the plaintiff signed an acknowledgement of receipt in the same way that such a receipt was signed by the plaintiff for the payment of the deposit of RM31,500. After all, the balance, purchase price of RM154,372.36 was a much bigger sum. DW1 gave the impression that he was determined to get the plaintiff to sign such a document after the meeting at the coffee shop but did not get to do so because the plaintiff did not turn up. This was a wholly unconvincing story because as we have seen, after this alleged coffee shop meeting, DW1 had driven all the way to McDonald's in Kulai specifically to see the plaintiff and his wife to get them to sign the bank redemption papers. It did not make sense that he did not at the same time bring the acknowledgment of receipt document for the plaintiff to sign. Furthermore, given his claim in court that the plaintiff had said he could not go to the defendant's office to sign the document because he stayed in Kulai and was much too busy with work, this would have been an opportune moment to get the plaintiff to sign the acknowledgment of receipt document. After all, the plaintiff had not purportedly said he did not want to sign — it was merely a matter of the distance. I was convinced that the reason DW1 did not think to do all this was because the meeting at the coffee shop and the purported admission of the plaintiff that he had already been paid the balance purchase price did not take place but was all a made up story.

[31] As regards the bank-in slips B:18–23 (also listed in B:17), DW1 himself said that they were brought in by one of the purchasers. Since he viewed the bank-in slips he would have realised that almost 80% of the payments in B:17 were paid even before the SPA was signed. He also admitted that he realised that the balance of the purchase price which is RM154,372.36 does not tally with the total amount of RM185,895 in B:17. Even the balance of purchase price together with the 10% deposit does not tally with the total amount of RM185,895 in B:17. It is also significant that from the cross-examination of DW2 and DW3, it was established that the payments shown in B:17 (or bank-in slips B:18–23) were hand-picked from the plaintiff's list of payments C:1–2 (P1) credited into his bank account by the purchasers in 2006 and 2007 in respect of the 4-Digit business. Under such circumstances, PW1's evidence that these bank-in slips ie B:17 were part of exh P1 which were payments made between him and the purchasers involving their 4-D business dealings and not for the balance purchase price of the property was the more probable.

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

[32] For the reasons stated above, I found that the plaintiff had proved on balance of probabilities that the alleged meeting at the coffee shop did not take place but was an afterthought of DW1, DW2 and DW3 to cover up DW1's non-compliance of cll 2 and 4 of the SPA in presenting the memorandum of transfer of the property for registration at the land office without ensuring that the balance purchase price had been paid in full. In my judgment, in transferring the property to the purchasers before the plaintiff had been paid the balance of the purchase price, the defendant had breached their duty of care as solicitors acting for the plaintiff.

WHETHER THE PLAINTIFF HAD SUFFERED DAMAGES AS A RESULT OF THE BREACH OF DUTY OF CARE (CAUSATION)

[33] By 'causation' the plaintiff must show there is a causal link between the loss he has suffered and the defendant's wrong. In *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggai Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; [2011] 1 CLJ 409, the issue before the Federal Court was whether the 'but for' test was applicable in a negligence action where there were overlapping factors causing harm to the plaintiff. The Federal Court at p 2 (MLJ); p 410 (CLJ) held:

> (1) In a negligence claim, there must be a link between the wrongdoing and the damage caused. The burden of proving this link is on the plaintiff. In establishing this link there can be other possible causes. The 'but for' test does not identify all of the possible causes of a particular incident, but focuses on the effective cause of damage in order to assign responsibility for the damage caused. Where combined or several causes contribute to the wrongdoing or harm, the 'but for' test is not suitable.
>
> (2) The 'but for' test is not the exclusive test to determine causation of the injury. Where several acts, events or factors cause harm to the plaintiff, the 'but for' test is not to be applied to determine causation. The test in such circumstances is to determine which of those acts, events or factors materially contributed to the plaintiff's injury. What is a material contribution is a question of degree for the court to decide upon. However, trifling contributions or contributions which come within the exception of *de minimis non curat lex* are not material.

[34] *Clerk & Lindsell on Torts* (18th Ed) 2000 para 2–06) elaborate on the test of causation stating as follows:

> The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

50 per cent probable, that 'but for' the defendant's wrongdoing the relevant damage would not have occurred. In other words, if the damage would have occurred in any event the defendant's conduct is not a 'but for' cause.

[35] As stated earlier, it is the plaintiff's pleaded case that the loss of the balance of the purchase price of the property was caused by the defendant's breach of their duty of care by proceeding with the completion of the sale and purchase of the property and the registration of the transfer to the purchasers even when the purchase price was not fully paid.

[36] The defendant on the other hand contended that the plaintiff contributed to his loss by failing to extend the caveat which had caused the property to be transferred to a third party. With respect, reliance on failure to extend the caveat, in my view, is misplaced. The issue of failure to extend the caveat as contributing to the plaintiff's loss was not in the pleadings and never raised in the case summaries or agreed issues to be tried. In my opinion the pronouncement of the Federal Court in *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC) that a judge should not depart from the strict rules of procedure in deciding the case on an issue not raised in the pleadings applies. The defendant was therefore precluded from raising the point. In any case, the issue of the property having been transferred to a third party is irrelevant to the plaintiff's action against the defendant. Needless to say, the plaintiff in this action is not going after the property and not asking for specific performance. The plaintiff suffered the loss and damages he is claiming from the defendant when the defendant completed the sale and purchase and transferred the property to the purchasers. This occurred even before the property was transferred to a third party.

[37] The defendant next contended that the plaintiff's claim should be against the purchasers, hence, there is duplicity of proceedings given that the plaintiff had also brought an action against the purchasers vide High Court Civil Suit No 22–73 of 2008. The defendant submitted that the instant suit amounted to multiplicity of proceedings and should be struck out for being vexatious and an abuse of court process. Other than saying that the parties in the other civil suit are the plaintiff and the purchasers, the defendant had not demonstrated how our present case is a duplicity of the other action. In any event, having carefully considered the facts I was of the view that the claim before this court is very distinct and separate as it is based on professional negligence against the common solicitors acting in the transaction whereas the claim in Suit No 22–73 of 2008 is against the purchasers for breach of contract. Hence, in my view, there is no duplicity of proceedings.

[38] Applying the 'but for' test spoken of in the authorities above to the factual matrix of the present case, it was crystal clear to me that the effective

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

cause of the plaintiff's loss of the property and the balance purchase price was the act of the defendant in not ensuring that the purchasers had paid the full balance purchase price to the plaintiff before registering the transfer of the property at the land office in favour of the purchasers. The plaintiff therefore had proved causation.

ILLEGALITY

[39] The defendant raised rather late in the day an entirely new and unpleaded point that the sale and purchase transaction in the present case was tainted with illegality. They said that PW4 (from the firm of solicitors acting for the plaintiff in Suit No 22–73 of 2008) had given evidence that his instructions were that the business transaction was related to 4-D. According to para 7 of the SOC in Suit No 22–73 of 2008, this business of 4-D is illegal and PW4 said his instructions were that the deposit paid was by this 4-D business. The defendant submitted therefore that even if the plaintiff's version were accepted, the transaction was tainted with illegality and the court should act on it. My answer to this is that illegality was not in issue before the court and was therefore not fully investigated. The court could not act on the evidence of mere instructions received by PW4 to come to a finding that the transaction in the present case is tainted with illegality. In any case, the defendant had rather conveniently just submitted that 'the court should act on it (the illegality)' without specifying what exactly the relief or remedy that the defendant thought they were entitled to out of the purported illegality. I considered the point raised as needlessly vexatious and without merit and dismissed it.

CONCLUSION

[40] For the reasons stated above, I found and held that the plaintiff had proved on balance of probabilities his claim in negligence against the defendant. I found that the damage caused to the plaintiff by the negligence of the defendant was the loss of the balance of the purchase price amounting to RM154,372.36. The plaintiff did not lead evidence to prove the other items of damages and had not submitted on the issue either. Accordingly, I entered judgment for the plaintiff in the sum of RM154,372.36 as prayed for in para 11(a) of the SOC whereas the claims under para 11(b) and (c) were dismissed. I awarded interest on the sum of RM154,372.36 at the prescribed rate from date of judgment until full and final settlement and costs of the action to the plaintiff to be taxed unless agreed.

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Fri Oct 10 12:51:50 2014

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan